Supreme Court, U.S.
FILED

(1)

98 1774 APR 29 1999

No. _____ OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1998

BAILEY A. JONES,
Petitioner,

v.

CITY OF BERKELEY RENT STABILIZATION BOARD,
Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal for the First Appellate District

PETITION FOR WRIT OF CERTIORARI

R. S. RADFORD
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioner

52 pp

QUESTION PRESENTED

Did the California Court of Appeal err in holding that, contrary to decisions of this Court, the Ninth Circuit Court of Appeals, and the state courts of New York, a property owner cannot state a claim for a regulatory taking based solely on the failure of land use regulations to substantially advance legitimate state interests as applied to his particular property?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 1

STATEMENT OF THE CASE 2

A. Berkeley's Rent Control Law and Bailey Jones' Property 2

B. The Trial Court Proceedings 3

C. The Court of Appeal's Decision 4

REASONS FOR GRANTING THE PETITION 7

I. UNDER THE TWO-PRONGED TEST SET FORTH BY THIS COURT IN *AGINS v. CITY OF TIBURON*, THE FAILURE OF A LAND USE REGULATION TO SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS AS APPLIED TO A SPECIFIC PROPERTY IS SUFFICIENT TO SUPPORT A CLAIM FOR A REGULATORY TAKING REGARDLESS OF THE MEASURE'S FACIAL VALIDITY OR ITS IMPACT ON OTHER PROPERTIES 7

A. Either Prong of the Disjunctive Standard Set Forth in *Agins v. City of Tiburon* Is Independently Sufficient to State a Claim for an As-applied Regulatory Taking 7

TABLE OF CONTENTS—Continued

Page

B. This Case Is the Mirror Image of *Lucas*--an As-Applied Regulatory Takings Claim Implicating Only the First Prong of *Agins* 10

C. This Case Implicates a Well-Defined Property Interest and Thus Properly Comes Under the Purview of the Just Compensation Clause 11

II. THE RULING BELOW, FORECLOSING THE POSSIBILITY OF PLEADING A REGULATORY TAKING UNDER THE FIRST PRONG OF *AGINS*, CONFLICTS WITH A RECENT DECISION OF THE NINTH CIRCUIT COURT OF APPEALS 12

III. THE DECISION BELOW IS YET ANOTHER IN A LINE OF CALIFORNIA CASES THAT CONFLICTS WITH DECISIONS OF THE HIGHEST STATE COURT OF NEW YORK ON FEDERAL CONSTITUTIONAL ISSUES ARISING UNDER THE JUST COMPENSATION CLAUSE 13

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases

Agins v. City of Tiburon, 447 U.S. 255 (1980) 4-16

Blue Jeans Equities West v. City and County of San Francisco, 3 Cal. App. 4th 164 (1992) 14

Callahan v. Martin, 43 P.2d 788 (1935) 12

Chicago, Burlington, & Quincy Railroad Co. v. City of Chicago, 166 U.S. 226 (1897) 3

Del Oro Hills v. City of Oceanside, 31 Cal. App. 4th 1060 (1995) 14

Dolan v. City of Tigard, 512 U.S. 374 (1994) 3, 8-9, 15

Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S. Ct 2131 (1998) 11-12

Ehrlich v. City of Culver City, 911 P.2d 429 (1996) 14

Hensler v. City of Glendale, 876 P.2d 1043 (1994) 14

Kavanau v. Santa Monica Rent Control Board, 941 P.2d 851 (1997) 14

Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) 9

Landgate v. California Coastal Commission, 953 P.2d 1188 (1998) 14

Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (1991) 10

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 6, 8-12

TABLE OF AUTHORITIES—Continued

Page

Manocherian v. Lenox Hill Hospital, 643 N.E.2d 479 (1994) 15-16

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 3, 9, 12, 14-15

Richardson v. City and County of Honolulu, 124 F.3d 1150 (9th Cir. 1997) 12-13

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981) 9

Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993 (1999) 10, 14

Seawall Associates v. City of New York, 542 N.E.2d 1059 (1989) 15

United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) 9

Yee v. City of Escondido, 503 U.S. 519 (1992) 6, 9, 12

United States Constitution, Statutes, Rules of Court

Fifth Amendment 1-3, 5, 7, 11

Fourteenth Amendment 1, 3

28 U.S.C. § 1257(a) 1

Cal. Civ. Code § 802(4) 12

Rule 13.1 1

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous

William A. Falik & Anna C. Shimko, *The "Takings" Nexus--The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 38 HASTINGS L. J. 359 (1988) 8

Stephen R. McCutcheon, Jr., *Lessened Protection for Property Rights--The Conjunctive Application of the Agins v. City of Tiburon Disjunctive Test*, 27 Pacific L. J. 1657 (1996) 8

Petitioner Bailey A. Jones respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, First Appellate District, entered in the above-entitled proceeding on August 13, 1997.

OPINIONS BELOW

The decision of the California Court Appeal is unreported and is reproduced as Appendix (App.) A to this petition. The Order Granting Defendant's Motion for Judgment on the Pleadings entered by the Alameda County Superior Court is unreported and is reproduced as Appendix E.

JURISDICTION

The opinion of the California Court of Appeal that is the subject of this petition was filed and entered on August 13, 1997. App. A. The Court of Appeal considered and decided the question of whether allegations that Berkeley's rent control law failed to substantially advance legitimate state interests supported a claim for an uncompensated regulatory taking of Mr. Jones' property in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The California Supreme Court granted Mr. Jones' petition for review on November 25, 1997 (App. C), but dismissed its order granting review on March 9, 1999 (App. B). This petition for writ of certiorari has been timely filed in accordance with Rule 13.1 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "private property [shall not] be taken for public use, without just compensation."

City of Berkeley Municipal Code Chapter 13.76, Rent Stabilization and Eviction for Good Cause Program (the Rent Control Law), imposes rent control on privately owned

residential rental property in Berkeley and exacts annual fees from owners to finance the rent control program. Relevant portions of the Rent Control Law are reproduced at Appendix F.

STATEMENT OF THE CASE

Petitioner Bailey A. Jones challenges the constitutionality of the continued application by the City of Berkeley Rent Stabilization Board (Rent Board) of a rent control ordinance to his property. Facts alleged in Mr. Jones' complaint, presumed true for purposes of appeal, establish that the continued application of this law to his property bears no nexus to the mitigation of any social ills attributable to Mr. Jones' unregulated use of his property. The decision of the court below, affirming a grant of judgment on the pleadings to the Rent Board, conflicts with decisions of the United States Court of Appeals for the Ninth Circuit and of the state courts of New York. It also conflicts with the constitutional standards set forth by this Court for property regulations challenged under the Just Compensation Clause of the Fifth Amendment to the United States Constitution.

A. Berkeley's Rent Control Law and Bailey Jones' Property

Bailey Jones provides affordable rental housing to the residents of Berkeley, California. Under the City's Rent Control Law,[1] as administered by the Rent Board, Mr. Jones may not offer his apartments for rent unless he complies with a number of conditions, including paying annual registration fees to finance the Rent Board's operations.

Under the Just Compensation Clause of the United States Constitution,[2] regulations that impose conditions on the use of

---

[1] Berkeley Municipal Code Chapter 13.76.

[2] The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without

(continued...)

private property must substantially advance legitimate governmental interests. *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). The stated purposes of Berkeley's Rent Control Law are to "protect tenants from unwarranted rent increases" and to "advance the housing policies of the city with regard to low and fixed income persons, minorities, students, handicapped, and the aged." App. F-2-3.

Facts alleged in Mr. Jones' complaint establish that the application of the Rent Control Law does not advance these interests but, instead, has actually *diminished* the supply of affordable rental housing available to the law's supposed beneficiaries, effectively forcing these vulnerable population groups to flee Berkeley in search of affordable accommodations elsewhere. App. A-3-4. Moreover, the complaint alleges that the Rent Board's regulations are not protecting anyone residing in Mr. Jones' property from "unwarranted rent increases," because market rents for Mr. Jones' affordable housing are less than those authorized by the Rent Board. App. A-3.

B. The Trial Court Proceedings

Because the Rent Board's application of the Rent Control Law to Mr. Jones' property does not (and cannot) protect his tenants from "unwarranted rent increases," and because the law's devastating effect on Berkeley's housing market has been precisely the opposite of its stated purpose, Mr. Jones challenged the constitutionality of the continued application of the Rent Control Law to his property, and specifically the Rent Board's forced exaction of monetary fees from him to finance its

---

[2](...continued)
payment of just compensation." U.S. Const. amend. V. The Fifth Amendment is made applicable to the states via the Fourteenth Amendment. *Chicago, Burlington, & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897).

operations, as a violation of the Just Compensation Clause. App. A-4.

The trial court granted the Rent Board's motion for judgment on the pleadings on the clearly erroneous grounds that a regulatory taking claim supposedly requires allegations that the plaintiff has been deprived of all economically viable use of his property. App. E-2. The court found that "[t]he allegation the Rent Ordinance does not substantially advance its purpose is inadequate on its own to state a cause of action for a taking." *Id.*

C. The Court of Appeal's Decision

Mr. Jones filed a timely appeal to the California Court of Appeal, First Appellate District. In his opening brief to the appellate court, Mr. Jones raised the federal takings issue, citing to this Court's repeated statements that the application of a land use regulation will violate the Just Compensation Clause if it fails to substantially advance legitimate state interests. Nevertheless, the court below affirmed. In upholding the dismissal of Mr. Jones' complaint, the Court of Appeal rejected the two-pronged test for regulatory takings first established by this Court in *Agins v. City of Tiburon*, 447 U.S. 255 (1980):

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.

Id. at 260. Rejecting the sufficiency of Mr. Jones' allegations of a violation of *Agins'* first prong, the court below held that he was instead required to state facts showing a violation of *Agins'* ***second*** prong:

> [A] property owner must allege that he has suffered some constitutionally significant economic loss due to the regulation of rents on his property.

App. A-10. The appellate panel based this mistaken interpretation of the Fifth Amendment on decisions of the California Supreme Court, which has

> consistently held that loss of income through regulation of rents will constitute an unconstitutional taking of private property only upon a showing that the regulatory scheme imposed by the rent control law is so restrictive that it prevents the property owner from receiving a "fair return" on his or her property investment.

Id. Denial of a "fair return," of course, goes to the economic injury imposed by rent regulations--the second prong of *Agins*. It is wholly unrelated to the failure of the regulations to substantially advance legitimate interests as applied to a specific property.

Compounding its error, the court below went on to assert that, "*even if*" a regulatory taking claim could be stated under *Agins'* first prong, Mr. Jones would be required to show that the law was unconstitutional not only as applied to *his own* property, but as applied to *all rental property in Berkeley*!

> Among other stated purposes, the Ordinance is expressly intended "to regulate residential rent increases . . . and to protect tenants from unwarranted rent increases." . . .
>
> . . . Jones's inability to rent *his* property at rates the Board would permit does not demonstrate the Ordinance's failure to advance its purpose of protecting *all* Berkeley tenants from "unwarranted rent increases." . . . There are many possible reasons for Jones's predicament, but under no circumstances does his particular situation provide a basis for proving the Ordinance does not generally serve its

> purposes in the city. The facts pleaded are simply insufficient to meet the threshold criteria for a takings challenge under *Agins*, *Nollan*, and *Dolan*.

App. A-12-13 (footnote omitted).

In other words, completely ignoring the Rent Control Law's disastrous effects on housing availability for low and fixed-income persons, minorities, students, the handicapped, and the aged, the court below held the law was immune to constitutional challenge so long as it could be presumed to hold rents below market for at least one property anywhere in the City of Berkeley. What this means is that a plaintiff cannot state a claim for an as-applied regulatory taking under *Agins'* first prong without also showing that the law is unconstitutional on its face (*i.e.*, fails to advance any legitimate state interest with respect to any and all potential plaintiffs, "no matter how it is applied." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)). This holding reflects much more than an elementary misunderstanding of the distinction between facial and as-applied takings claims. Rather, it resurrects and recasts an error of the South Carolina Supreme Court that was remedied by this Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Whereas the state court in *Lucas* held that no as-applied taking would be found under *Agins'* ***second*** prong so long as the regulatory scheme could be presumed to advanced some legitimate governmental purpose on its face, the court below has resurrected this erroneous doctrine and applied it in the context of claims brought under *Agins'* ***first*** prong.

REASONS FOR GRANTING THE PETITION

I

UNDER THE TWO-PRONGED TEST SET FORTH BY THIS COURT IN *AGINS v. CITY OF TIBURON*, THE FAILURE OF A LAND USE REGULATION TO SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS AS APPLIED TO A SPECIFIC PROPERTY IS SUFFICIENT TO SUPPORT A CLAIM FOR A REGULATORY TAKING REGARDLESS OF THE MEASURE'S FACIAL VALIDITY OR ITS IMPACT ON OTHER PROPERTIES

A. Either Prong of the Disjunctive Standard Set Forth in *Agins v. City of Tiburon* Is Independently Sufficient to State a Claim for an As-applied Regulatory Taking

Bailey Jones alleges that the Rent Board's application of the Rent Control Law to his property has effected an uncompensated regulatory taking in violation of the Fifth Amendment to the United States Constitution. The test for establishing such a claim was set forth by this Court in *Agins v. City of Tiburon*:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land.

447 U.S. at 260 (citations omitted). *Agins* plainly sets forth a disjunctive, two-pronged standard. Under this test, a regulatory taking must be found if land use regulations *either* fail to substantially advance legitimate state interests as applied to particular real property, *or* deprive an owner of economically viable use of his land. Either prong of the *Agins* standard is independently sufficient to establish a regulatory taking. The

independence of *Agins'* two prongs has been evident to all serious commentators who have considered the question:

> The Supreme Court in *Agins* plainly indicated that only one of these two prongs must be satisfied to establish a regulatory taking.

William A. Falik & Anna C. Shimko, *The "Takings" Nexus--The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 38 HASTINGS L. J. 359, 362 (1988).

> [A] landowner may recover for a "regulatory taking" if the regulation fails *either* of the two prongs.

Stephen R. McCutcheon, Jr., *Lessened Protection for Property Rights--The Conjunctive Application of the Agins v. City of Tiburon Disjunctive Test*, 27 Pacific L. J. 1657, 1664 (1996).

Nevertheless, the court below held that "under no circumstances" can Mr. Jones state a claim for a taking on the grounds that the Board's application of the Rent Control Law fails the first prong of *Agins* as applied to his property. App. A-13.

The ruling below clearly amounts to a state appellate court "overruling" this Court on a settled point of federal constitutional law. This Court has repeatedly stated--*and demonstrated*--that either prong of the *Agins* test is independently sufficient to state a claim for a regulatory taking *as applied to a plaintiff's specific property*. Indeed, twice in this decade this Court has found an as-applied regulatory taking in situations where it expressly recognized that one prong of *Agins* ***did not*** apply! The plaintiff in *Dolan v. City of Tigard*, an as-applied first prong case, could not plead deprivation of economically viable use, as was expressly noted by this Court. 512 U.S. at 385 n.6. Conversely, in *Lucas v. South Carolina Coastal Council*, an as-applied second prong case, this Court's opinion acknowledged that the law in question substantially advanced legitimate state interests.

505 U.S. at 1009-10. Nevertheless, a regulatory taking was found in both *Dolan* and *Lucas*.

The first prong of the disjunctive *Agins* test, establishing that a taking will be found if a property regulation fails to substantially advance legitimate state interests as applied to particular property, has been set forth by this Court in the context of challenges to zoning regulations, *Agins*, 447 U.S. at 260; *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 648 (1981), mining regulations, *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987), and coastal zone and wetlands development restrictions, *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1016; *United States v. Riverside Bayview Homes*, 474 U.S. 121, 127 (1985), and has been expressly held applicable to rent control. *Yee v. City of Escondido*, 503 U.S. at 530. A regulatory taking was found in *Nollan v. California Coastal Commission*, a case in which the plaintiff challenged the application of California's Coastal Act to a particular parcel of land, even though only the first prong of the *Agins* test was implicated. 483 U.S. at 834-37.

In *Yee v. City of Escondido*, 503 U.S. 519, this Court expressly stated that a rent control law's failure to substantially advance its stated goals may result in a regulatory taking. *Id.* at 530. If, as alleged in Mr. Jones' complaint, the Rent Board's application of the Rent Control Law has actually ***worsened*** rather than mitigated the social ills that justified its adoption, then the Board's continued application of that law is unconstitutional regardless of its economic impact on Mr. Jones' property. The ruling of the court below, that such facts do not state a claim under *Agins* unless the challenged measure has no impact on rent levels anywhere in the community, is a novel and dangerous repudiation of the fundamental regulatory takings doctrine of this Court.

B. This Case Is the Mirror Image of *Lucas*--an As-Applied Regulatory Takings Claim Implicating Only the First Prong of *Agins*

In 1991, the South Carolina Supreme Court directly challenged this Court's *Agins* doctrine in a manner that is perfectly analogous to the decision below. In *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (1991), the South Carolina high court opined that an as-applied regulatory taking could not be stated under *Agins'* ***second*** prong so long as the regulations at issue could be presumed to advance important state interests on their face. *Id.* at 899-900. This Court granted certiorari and reversed, reaffirming the vital principle that violation of either of *Agins'* two prongs constitutes a violation of the Just Compensation Clause with respect to a particular property. *Lucas*, 505 U.S. at 1030-32.

The only difference between the state *Lucas* decision and the opinion below is that this case implicates the first prong of *Agins*, rather than the second prong. By holding that Bailey Jones cannot state an as-applied takings claim under *Agins'* first prong without showing that the law fails to substantially advance any of its stated purposes with respect to any property, the court below has simply paraphrased the decision this Court reversed in *Lucas*.

As a dissenting Justice of the California Supreme Court recently noted:

> We as judges write judicial opinions and articulate legal standards because we believe that words, though imperfect, have the power to convey objective meaning.

Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993, 1037 (1999) (Chin, J., dissenting). If this Court's statement of the test for as-applied regulatory takings in *Agins* is to convey any objective meaning, ***both*** prongs of that test must provide independently sufficient grounds for finding a taking, regardless

of the impact of the regulation on other properties. This Court unequivocally established this fact with respect to *Agins'* second prong in *Lucas*. The present petition for certiorari should be granted in order to confirm the coequal status of *Agins'* first prong.

C. This Case Implicates a Well-Defined Property Interest and Thus Properly Comes Under the Purview of the Just Compensation Clause

In *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct 2131 (1998), this Court considered the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act) as applied to a specific plaintiff. The plurality decision recognized that purely economic regulation may properly be subjected to a takings analysis, requiring an "essentially ad hoc and fact intensive" inquiry to establish whether the measure imposes special burdens on a particular plaintiff that should, in justice and fairness, be borne by society as a whole. *Id.* at 2146. The plurality found that the Coal Act violated the Just Compensation Clause as applied to Eastern Enterprises, in part because of a lack of proportionality between the burdens imposed by the regulations and the plaintiff's individual contribution to the social ills the act was intended to address. 118 S. Ct. at 2153. In his concurring opinion, Justice Kennedy questioned whether an identifiable, protected property interest existed in that case, emphasizing "the importance of identifying the property allegedly taken, lest all governmental action be subjected to examination under the constitutional prohibition against taking without just compensation." *Id.* at 2156 (Kennedy, J. concurring).

In the case at bar there can be no question that the Rent Board's application of the Rent Control Law to Mr. Jones' property implicates a well-defined property interest protected under the Fifth Amendment. As this Court has often recognized, the right to the peaceful use and enjoyment of privately owned land is itself an essential, constitutionally protected property

interest. *See Nollan*, 483 U.S. at 833 n.2; *Lucas*, 505 U.S. at 1031. More specifically, under California law one of the interests inhering in the ownership of real property is the right to receive the rents and profits therefrom. *Callahan v. Martin*, 43 P.2d 788, 795 (1935). This right is a freely alienable property interest which is statutorily designated as a servitude. Cal. Civ. Code § 802(4); *see Callahan*, 43 P.2d at 794-95. Thus, unlike the situation that prompted Justice Kennedy's separate opinion in *Eastern Enterprises*, the regulatory taking claim at issue in this case plainly implicates an identified property interest that is entitled to protection under the Just Compensation Clause.

II

THE RULING BELOW, FORECLOSING THE POSSIBILITY OF PLEADING A REGULATORY TAKING UNDER THE FIRST PRONG OF *AGINS*, CONFLICTS WITH A RECENT DECISION OF THE NINTH CIRCUIT COURT OF APPEALS

The holding of the court below, that a claim for a regulatory taking may not be pled under the first prong of *Agins* alone, conflicts with a recent decision of the United States Court of Appeals for the Ninth Circuit. In *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), the Court of Appeals struck down a rent control ordinance for failing to substantially advance its stated objectives--the same standard that was rejected by the court below. The Ninth Circuit expressly invoked this Court's admonition that a regulatory taking challenge to a rent control law may turn on "whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Id.* at 1165 (quoting *Yee v. City of Escondido*, 503 U.S. at 530).

The *Richardson* plaintiff, like Mr. Jones, raised a challenge under the first prong of *Agins*, alleging "that Ordinance 91-96 fails to substantially further its stated public purposes and,

therefore, constitutes a regulatory taking." *Id.* at 1164. The Court of Appeal agreed, finding that

> [l]and use regulations do influence the value of property, but to be constitutional, they must do so in a manner that substantially furthers a legitimate government interest. Ordinance 91-96 does not do this. It regulates the use of the lessors' property interests in a manner that does not substantially further the goal of creating affordable housing. . . . The Ordinance thus effects a regulatory taking.

Id. at 1165-66 (citation omitted).

Because of the California courts' refusal to entertain regulatory takings claims brought under *Agins*' first prong, rental property owners in California face radically different levels of protection under the Just Compensation Clause, depending on whether they pursue their claims in state or federal court. This Court should grant certiorari to resolve the conflict between the state courts of California and the Ninth Circuit Court of Appeals on this important question of federal constitutional law.

III

THE DECISION BELOW IS YET ANOTHER IN A LINE OF CALIFORNIA CASES THAT CONFLICTS WITH DECISIONS OF THE HIGHEST STATE COURT OF NEW YORK ON FEDERAL CONSTITUTIONAL ISSUES ARISING UNDER THE JUST COMPENSATION CLAUSE

In nearly 20 years since this Court's *Agins* ruling, the state courts of California have never once found a compensable regulatory taking under *either* prong of the disjunctive standard set forth in that case. Instead, the California judiciary has energetically devoted itself to limiting, restricting, and distinguishing this Court's regulatory takings holdings to ensure that no agency of government in that state will ever face the

discipline of the Just Compensation Clause.[3] In contrast, the highest state court of New York has fulfilled its judicial responsibilities by applying this Court's regulatory takings doctrine, specifically including the first prong of *Agins*. The resulting conflict between the courts of the most populous states of the Union on an important question of federal constitutional law can only be resolved by intervention by this Court.

In contrast to the ruling of the court below, the highest court of the State of New York has applied the first prong of

---

[3] *See, e.g., Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164, 166 (1992) (holding that this Court's landmark regulatory takings decision in *Nollan v. California Coastal Commission* does not apply to regulatory takings); *Hensler v. City of Glendale*, 876 P.2d 1043, 1056-58 (1994) (holding that as-applied inverse condemnation claims brought under the Just Compensation Clause must be filed within a 90-day (or shorter) statute of limitations); *Del Oro Hills v. City of Oceanside*, 31 Cal. App. 4th 1060, 1073-75 (1995) (holding that *Agins*' disjunctive regulatory taking standard is actually *conjunctive*, and plaintiffs are required to satisfy both prongs); *Ehrlich v. City of Culver City*, 911 P.2d 429, 437-47 (1996) (limiting *Nollan's* heightened standard of review to a small class of physical and monetary exactions imposed as conditions to the issuance of land use permits); *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851, 865 (1997) (holding that a remedy under the Just Compensation Clause is not available in California if a due process remedy is "available and adequate"); *Landgate v. California Coastal Commission*, 953 P.2d 1188, 1197 (1998) (holding that just compensation is not available for the period of time required to obtain judicial relief from the government's wrongful deprivation of all economically viable use of plaintiff's land); *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 1002-05 (holding that plaintiffs are not entitled to put on evidence that the application of a rent control ordinance fails to substantially advance legitimate state interests under *Agins*). Many other California appellate decisions have followed these state court precedents; none have deviated from them so far as to award or uphold an award of just compensation for a regulatory taking.

Agins to find compensable takings arising from overzealous regulation of private rental property. In *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (1989), the New York Court of Appeals overturned Local Law 9, a regulation that prohibited the conversion or demolition of single room occupancy (SRO) residential hotels. The stated purpose of the ordinance was to alleviate homelessness by increasing the availability of SRO housing. A group of owners sued the city, arguing that, *inter alia*, Local Law 9 violated the Just Compensation Clause by failing to substantially advance its admittedly legitimate objectives.

Partly because of evidence that Local Law 9 could not significantly advance its stated goal of relieving homelessness, the state high court found that "the nexus between the obligations placed on SRO property owners and the alleviation of the highly complex social problem of homelessness is indirect at best and conjectural." 542 N.E.2d at 1069. In contrast, the court below refused even to allow Bailey Jones to put on evidence concerning the relationship of the Rent Control Law and the advancement of its stated purposes.

Five years after *Seawall*, the New York Court of Appeals applied this Court's *Dolan* decision to find a regulatory taking in *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (1994). In striking down a rent control measure under the Just Compensation Clause, the New York panel observed that *Nollan* and *Dolan* "establish a constitutional minimum floor of protection which this Court lacks authority to diminish under the supremacy clause." *Id.* at 482. Applying the ends-means scrutiny required by this Court, the Court of Appeals found that the challenged measure effected a taking because it "suffers a fatal defect by not substantially advancing a closely and legitimately connected State interest" as required by *Nollan* and *Dolan*. *Id.* at 480.

The New York court addressed and rejected the very argument embraced by the court below:

> [W]e are satisfied that even if the economic impact aspect of this test were not to be satisfied, that feature alone could not defeat the owners' interests and claims in a controversy such as this, without consideration and fulfillment of the substantial State interest and close causal nexus prong of the governing test, even as to regulatory takings. . . . The sharply focused legal question under the controlling precedential and analytical principles may be reduced simply to whether the legislation is supported by a substantial State interest and close nexus.

Id. at 482, 486.

By rejecting the first prong of this Court's *Agins* analysis as an independently sufficient ground for finding a regulatory taking as applied to specific property, the court below has come into direct conflict with the rigorous application of this standard by the New York Court of Appeals. This Court should grant the petition for certiorari in order to resolve this conflict between the two largest states in the Nation, as well as the corresponding conflict between the state and federal courts in California, on important federal questions arising under the Just Compensation Clause.

CONCLUSION

For all the above reasons, the petition for a writ of certiorari should be GRANTED.

DATED: April, 1999.

Respectfully submitted,

R. S. RADFORD
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioner

Filed 8/13/97

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

BAILEY A. JONES,

Plaintiff and Appellant,

v.

A074359

CITY OF BERKELEY RENT STABILIZATION BOARD,

(Alameda County) Super. Ct. No. 743567-6

Defendant and Respondent;

D. SMITH et al.,

Real Parties in Interest.

_____/

This appeal concerns a challenge to the constitutionality of the City of Berkeley's rent control ordinance (the Ordinance).[1] In his complaint against Berkeley's Rent Stabilization Board (the Board), appellant Bailey A. Jones sought a judgment declaring the Ordinance unconstitutional as applied to him and a refund of registration fees he paid to the Board. Jones now appeals a judgment dismissing his complaint on the Board's motion for judgment on the pleadings. He contends his complaint sets forth sufficient facts to establish a cause of action for regulatory taking of his property in violation of the federal and California

[1] The Ordinance, entitled "Rent Stabilization and Eviction for Good Cause Ordinance," is codified as chapter 13.76 of the Berkeley Municipal Code beginning at section 13.76.010. Throughout this opinion, the City of Berkeley will be referred to as Berkeley.

Constitutions. (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, §19.) We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Ordinance was enacted and became effective in 1980. Among its stated purposes are regulation of residential rent increases, protection of tenants from "unwarranted rent increases," maintenance of the "diversity of the Berkeley community," and advancement of "the housing policies of the city with regard to low and fixed income persons, minorities, students, handicapped, and the aged." (Berkeley Mun. Code, §13.76.030).[2] The Ordinance requires nearly all owners of residential property that is either being rented or made available for rent to register their units with the Board and pay annual registration fees. (Berkeley Mun. Code, §13.76.060 (F)(2), 13.76.080 (A), (D).)

Jones is the owner of five rental properties in Berkeley, containing a total of thirty-six residential units. Eighteen of these units were rented pursuant to section 8 of the United States Housing Act (42 U.S.C. § 1437f) and were therefore exempt from the registration and rent ceiling provisions of the Ordinance. (Berkeley Mun. Code, §13.76.050 (D).) Of the remaining 18 units subject to rent control, 5 units were vacant as of June 1994. Jones alleged the Board had set maximum

---

[2] Berkeley Municipal Code section 13.76.030 states: "The purposes of this chapter are to regulate residential rent increases in the city of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation is designed to address the city of Berkeley's housing crisis, preserve the public peace, health and safety, and advance the housing policies of the city with regard to low and fixed income persons, minorities, students, handicapped, and the aged."

allowable rents higher than those he was actually receiving for the 13 occupied rent-controlled units. Despite his best efforts, he was unable to rent the five vacant units for the maximum allowable rent.

On June 27, 1994, Jones paid the Board $1,515 in annual registration fees and included a letter protesting payment. On August 12, he submitted a Government Code section 905 claim to the Berkeley City Attorney, requesting a refund of the $1,515. On September 6, following the instructions of the city attorney's office, Jones submitted his refund claim directly to the Board. The Board denied Jones's claim on September 12, 1994.

Jones filed his initial complaint against Berkeley and the Board, seeking a refund of the registration fees and a declaratory judgment that the Ordinance is unconstitutional. After the trial court granted Berkeley's demurrer without leave to amend and the demurrer of the Board with leave to amend, Jones filed his first amended complaint against the Board alone, naming his individual tenants as real parties in interest.

In his first amended complaint, Jones alleged: (1) the maximum rents established by the Board for his property are higher than the rents he is actually able to obtain on the open rental market; (2) between 1980 and 1990, Berkeley's stock of rental housing units declined by more than 12 percent, while the supply of rental units in every comparable city of Northern California without rent control increased; (3) during that period, the number of low-income and very low-income renter households in Berkeley decreased by more than 2,000, contrary to the trend in all comparable Northern California cities without rent control; (4) during that decade, the number of college students living in Berkeley declined by 700, contrary to the trend in all comparable Northern California cities without rent control; and (5) at the same time, the number of senior citizens living in Berkeley increased by less than 1 percent, a smaller increase than would be accounted for by the natural aging of the 1980

population, also contrary to the trend in all other Northern California cities without rent control.

The first amended complaint alleged the application of the Ordinance to Jones's property has failed to substantially advance any legitimate governmental interest and the burdens it imposes on his property, in the form of annual registration fees, are not proportional to any social harms that would otherwise be caused by the unregulated use of the property. On this basis, Jones argued the Board's imposition of annual registration fees constitutes a regulatory taking of his property in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the California Constitution.[3]

The Board filed a motion for judgment on the pleadings. After a hearing, the trial court granted the motion and entered judgment against Jones. The court found that Jones had failed to allege a cause of action for unconstitutional taking because he had not alleged any serious economic injury, either by being denied a fair return on his property or by being prevented from realizing any viable use for the property. This appeal followed.

DISCUSSION

"A motion for judgment on the pleadings is analogous to a general demurrer." (*Lance Camper Manufacturer Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 198; *Barker v. Hull* (1987) 191 Cal.App.3d 221,224.) On appeal from the

---

[3] The relevant provision of the Fifth Amendment to the United States Constitution, commonly referred to as the takings clause, states: ". . . [N]or shall private property be taken for public use without just compensation." The comparable provision in the California Constitution, found at Article I, section 19, reads in pertinent part: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner."

grant of a motion for judgment on the pleadings, the standard of review is the same as that applicable to a judgment following the sustaining of a demurrer. (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 815, 825; *Fosgate v. Gonzales* (1980) 107 Cal.App.3d 951, 957.) Like a demurrer, a motion for judgment on the pleadings is confined to the face of the pleading under attack, and all facts alleged are deemed admitted. We must give the complaint a reasonable interpretation by reading it as a whole, viewing all parts in their context. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125; *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 679, fn. 31; *Lance Camper*, supra, at p. 198.) We are not bound by the trial court's determination but are required to render our independent judgment on whether a cause of action has been stated. (*Lance Camper*, supra, at p. 198; *Hoffman v. State Farm Fire & Casualty Co.* (1993) 16 Cal.App.4th 184, 189.)

The central allegation of Jones's first amended complaint is that the Ordinance has effectively reduced the availability of private rental housing in Berkeley and made it more difficult for low-income renters, students, and the elderly to obtain affordable housing, without protecting them from unwarranted rent increases. Jones contends this allegation, that the Ordinance has had a negative effect on the Berkeley rental housing market in violation of its statement of purpose, is sufficient to state a cause of action for unconstitutional taking of property, even though he has not alleged *any* economic damage to himself other than the payment of the annual registration fees to the Board.

Jones challenges the trial court's finding that there can be no taking of property without a showing of "serious economic injury." Citing a number of recent decisions by the United States Supreme Court, Jones argues there are two distinct tests for finding a regulatory taking: *either* (1) the challenged ordinance does not substantially advance legitimate state interests; *or* (2) the ordinance denies an owner economically viable use of the land. (*Dolan v. City of Tigard* (1994) 512 U.S. 374, 385

(Dolan); *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1016; *Yee v. Escondido* (1992) 503 U.S. 519, 534; *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, 834 (*Nollan*); *United States v. Riverside Bayview Homes, Inc.* (1985) 474 U.S. 121, 126; *Agins v. Tiburon* (1980) 447 U.S. 255, 260 (*Agins*).) The original statement of these alternative tests is found in *Agins, supra*: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, [citation], or denies an owner economically viable use of his land, [citation]."[4] (447 U.S. at p. 260.)

Jones argues that these are independent, *alternative* tests. By his reading of the law, a regulation affecting real property may be deemed a taking if it can be shown that it does not substantially advance any legitimate state interest, whether or not the regulation causes the complaining landowner any significant economic injury. In fact, Jones contends he can state a cause of action for a taking without alleging that his own property has suffered any appreciable economic injury at all. Neither *Agins* nor any subsequent case citing it has explicitly addressed the question of whether, under this disjunctive statement of the test, a land-use regulation may effect a taking even if it has absolutely no negative economic effect on the subject property.

Nevertheless, as interpreted by our Supreme Court in *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854 (*Ehrlich*), the recent decisions in *Nollan* and *Dolan* suggest that in certain cases governmental action may amount to a taking if a

---

[4] In language not cited by *Jones*, the Supreme Court continued: "The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, [citation], the question necessarily requires a weighing of private and public interests." (*Agins, supra*, 447 U.S. at pp. 260-261 .)

challenged ordinance does not substantially advance legitimate state interests, whether or not there has been substantial economic harm to the landowner. This test requires the finding of both an "essential nexus" between the challenged regulatory exaction and the legitimate governmental purpose assertedly justifying the regulation, and a "rough proportionality" in nature and extent between the government regulation and the projected impact of the proposed private action. (Nollan, supra, 483 U.S. at pp. 835-838; *Dolan*, *supra*, 512 U.S. at pp. 386-391.) However, as Justice Arabian pointed out in *Ehrlich*, the "heightened standard of scrutiny" reflected in *Nollan* and *Dolan* is "triggered by a relatively narrow class of land use cases--those exhibiting circumstances which increase the risk that the local permitting authority will seek to avoid the obligation to pay just compensation." (12 Cal.4th at p. 868.)[5]

In *Nollan*, the California Coastal Commission required residential property owners to grant a lateral easement for public access across the seaside of their beachfront property as a condition for approval of a building permit to construct a larger beach house. (483 U.S. at p. 828.) In *Dolan*, the City of Tigard, Oregon, required the plaintiff to dedicate a portion of her property to public use as a pedestrian and bicycle pathway as a condition for granting a building permit allowing her to expand her business. (512 U.S. at pp. 377-380.) Thus, in both cases, local governments conditioned the approval and issuance of development permits on specific land-use restrictions or dedications that would have amounted to uncompensated requisitions of private property for public use but for the claim the conditions were justified by the ultimate police power to deny a permit altogether. (*Ehrlich*, *supra*, 12 Cal.4th at p. 868.)

---

[5] This portion of the *Ehrlich* plurality opinion by Justice Arabian was joined in by Justice Werdegar, making it the opinion of the court. (*See Ehrlich*, *supra*, 12 Cal.4th at p. 912 (conc. and dis. opn. of Werdegar, J.).)

As the court stated in *Ehrlich*, "[S]uch a discretionary context presents an inherent and heightened risk that local government will manipulate the police power to impose conditions *unrelated* to legitimate land use regulatory ends, thereby avoiding what would otherwise be an obligation to pay just compensation. . . . It is the imposition of land-use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the sine qua non for application of the intermediate standard of scrutiny formulated by the court in *Nollan* and *Dolan*." (*Ehrlich, supra*, 12 Cal.4th at p. 869, italics in original.)

In Ehrlich, our Supreme Court extended the *Nollan/Dolan* analysis to situations in which the local government has imposed special monetary exactions on an individual and discretionary basis. The court expressly contrasted such specific, individual exactions with situations in which generally applicable fees or assessments are imposed on a broad class of property owners in a nondiscretionary, ministerial fashion. In such cases, the *Ehrlich* court found there is less risk of an extortionate use of the police power to impose unconstitutional conditions. (12 Cal.4th at p. 876.)[6] Thus, where a regulatory exaction takes the form of

---

[6] "There is no question that the takings clause is specially protective of property against *physical* occupation or invasion . . . . It is also true, as the city points out, that government generally has greater leeway with respect to noninvasive forms of land-use regulation, where the courts have for the most part given greater deference to its power to impose broadly applicable fees, whether in the form of taxes, assessments, user or development fees . . . imposed on a broad class of property owners. Fees of this nature may indeed be subject to a lesser standard of judicial scrutiny than that formulated by the [United States Supreme Court] in *Nollan* and *Dolan* because the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present. Nonetheless, we reject the proposition that *Nollan* and *Dolan* are entirely without application to

(continued...)

such a generally applicable fee or assessment, ". . . the courts have deferred to legislative and political processes to formulate 'public program[s] adjusting the benefits and burdens of economic life to promote the common good.' [Citation.]" (Id. at p. 881.)

The facts of this case clearly distinguish it from those cases to which the *Nollan/Dolan/Ehrlich* analysis applies. The Ordinance requires all owners of nonexempt residential rental dwelling units in Berkeley to register these units and pay annual registration fees to the Board. These fees are determined on a standardized per-unit basis established by the Board, an elected body responsible to the voters. (Berkeley Mun. Code, §§ 13.76.060 (A), (D), (N), (P); 13.76.080 (D).) Unlike the specific $280,000 mitigation fee imposed on the particular developer in *Ehrlich* as a condition for approval of his request that his property be rezoned to permit construction, the annual registration fees imposed under the Ordinance apply generally to *all* Berkeley property owners offering nonexempt residential units for rent, and are imposed ministerially rather than on an individual and discretionary basis. Moreover, Jones has not alleged that any exaction or restriction imposed on him by the Ordinance interferes in any way with his use of his property. To the contrary, he has alleged that the allowable rent levels established by the Board are actually ***higher*** than the rents he is able to obtain on the open market.

Numerous cases have upheld rent control ordinances against attacks comparable to the one in this case, made on the ground of alleged unconstitutionality under the takings clauses of the federal and state Constitutions. The United States Supreme

---

[6] (...continued)

monetary exactions. When such exactions are imposed--as in this case--neither generally nor ministerially, but on an individual and discretionary basis, we conclude that the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered." (*Ehrlich, supra*, 12 Cal.4th at pp. 875-876, italics in original.)

Court has repeatedly affirmed the right of local governments to regulate housing conditions in general, and the landlord-tenant relationship in particular, without paying compensation for all economic injuries that may be caused by such regulation. (*Yee v. Escondido, supra*, 503 U.S. at pp. 528-529; *Pennell v. San Jose* (1988) 485 U.S. 1, 9-12; *FCC v. Florida Power Corp.* (1987) 480 U.S. 245, 252-254; *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 440.) Thus, a property owner must allege that he has suffered some constitutionally significant economic loss due to the regulation of rents on his property.

The California Supreme Court has twice considered facial challenges to the legality of Berkeley's rent control law. It has consistently held that loss of income through regulation of rents will constitute an unconstitutional taking of private property only upon a showing that the regulatory scheme imposed by the rent control law is so restrictive that it prevents the property owner from receiving a "fair return" on his or her property investment. (*Fisher v. City of Berkeley*, supra, 37 Cal.3d at p. 686; see also *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 165.) The Courts of Appeal have upheld similar rent control ordinances in the face of takings and due process challenges. (*Donohue v. Santa Paula West Mobile Home Park* (1996) 47 Cal.App.4th 1168, 1176-1180; *Yee v. Mobilehome Park Rental Review Bd.* (1993) 17 Cal.App.4th 1097, 1104- 1105; *Sandpiper Mobile Village v. City of Carpinteria* (1992) 10 Cal.App.4th 542, 546-551 (*Sandpiper*); *West Hollywood Concerned Citizens v. City of West Hollywood* (1991) 232 Cal. App.3d 486, 496-499; *Casella v. City of Morgan Hill* (1991) 230 Cal.App.3d 43, 49-58.) No court in this state has ever held that payment of a regulatory fee, generally applicable to all affected property owners and fairly administered as part of a rent control ordinance, constitutes a taking of property.[7]

---

[7] We note that several recent California appellate court decisions preceding the Supreme Court's decision in *Ehrlich* have held that a

(continued...)

[7] (...continued)
regulatory taking cannot be established without a showing that the challenged ordinance or regulation denied the property owner economically viable use of his land. *(Del Oro Hills v. City of Oceanside* (1995) 31 Cal.App.4th 1060, 1073-1080 (*Del Oro Hills*); *Westwinds Mobile Home Park v. Mobilehome Park Rental Review Bd.* (1994) 30 Cal.App.4th 84, 95 (*Westwinds*); *Sandpiper, supra*, 10 Cal.App. 4th at pp. 549-551.) As stated in *Del Oro Hills*: "[T]he focus of both parts of the test [stated in *Nollan*, *Dolan*, and *Agins*] is on whether property has been taken without just compensation, not on whether a regulation is in the abstract an invalid one; the inquiry must be what effect the regulation has on affected property owners." (*Del Oro Hills, supra*, 31 Cal .App.4th at pp. 1074-1075.) The court further stated, ". . . [W]e cannot accept [the] theory that satisfaction of one element of the *Agins* test (i.e., that there was an invalid regulation) is enough to establish a taking as a matter of law. In *Nollan*, *Lucas* [*v. So. Carolina Coastal Council, supra*, 505 U.S. 1003], and *Dolan*, the United States Supreme Court's analysis of the taking issue inextricably interlinked both the regulation's validity and the question of whether any economically beneficial use of the property remained in light of the regulation. In light of later authority, *Agins* did not establish an 'either/or' type of test." (*Del Oro Hills, supra*, at p. 1079.)

Generally speaking, we agree with the decisions of the Courts of Appeal in these cases that it is for legislative bodies, not the courts, to determine whether the economic objectives of a regulatory ordinance are advanced by the ordinance's effects in practice. (*Del Oro Hills, supra*, 31 Cal.App.4th at pp. 1074-1075; *Westwinds, supra*, 30 Cal. App.4th at p. 95, fn. 8; *Sandpiper, supra*, 10 Cal.App. 4th at p. 551.) In light of *Ehrlich*, however, the continuing force of these decisions may be in question, insofar as they suggest that a finding of a *regulatory* taking requires a showing that the property owner has been denied all economically viable use of his land.

In a letter submitted after oral argument, counsel for Jones directs our attention to the recent decision of Division Five of this district, *152 Valparaiso Associates v. City of Cotati* (1997) Daily
(continued...)

Even if we ignore this long line of California authority upholding the Ordinance and others like it, and assume for the sake of argument that a challenge to the Ordinance may be cognizable under recent regulatory takings jurisprudence, we nevertheless conclude that the trial court properly granted the motion for judgment on the pleadings. Jones has failed to allege sufficient facts to show the Ordinance does not substantially advance a legitimate state interest.

Among other stated purposes, the Ordinance is expressly intended "to regulate residential rent increases . . . and to protect tenants from unwarranted rent increases . . . ." These have been held to be legitimate governmental interests. (*Yee v. Escondido, supra*, 503 U.S. at pp. 528-529; *Pennell v. San dose, supra*, 485 U.S. at pp. 9-13; *Fisher v. City of Berkeley, supra*, 37 Cal.3d at

---

[7] (...continued)
Journal 97 D.A.R. 9336 (*Cotati*). *Cotati* is distinguishable on its facts. In Cotati, the plaintiff landlords sought a rent increase sufficient to give them "a fair return on their investment in . . . capital improvements," but the Cotati rent board "refused to grant *any* such increase." As a result, the plaintiffs were denied any return on their capital investments. (*Ibid.*) In contrast, Jones has never alleged that the Board denied him a fair return on his investment. To the contrary, he concedes that the rents permitted by the Board were actually higher than the rents he could collect on the rental market. Thus, unlike in *Cotati*, Jones asks this court to conclude an uncompensated taking has taken place when there has been *no* "serious economic injury" to his return on his property.

Of course, Jones argues that he need not plead and prove serious economic injury at all. In support of this argument, he cites expansive language in *Cotati* applying a regulatory takings analysis based solely on the challenged regulation's failure to substantially advance a legitimate state interest. (*Cotati, supra*, 97 D.A.R. at p. 9338.) However, this discussion in *Cotati* is unnecessary to the conclusion it reaches. As the *Cotati* court is careful to emphasize, the plaintiffs there were denied *any* fair return on their real property investment. (*Id.* at pp. 9337-9338.)

pp. 679-682, 690-691; *Birkenfeld v. City of Berkeley, supra*, 17 Cal.3d at pp. 153-165.) The only factual allegation in Jones's complaint purporting to address the question whether there is a constitutionally sufficient nexus between the practical effect of the Ordinance and these legitimate objectives is his allegation that the maximum rents established by the Board for Jones's *own* property are *higher* than the rents he has actually been able to obtain for vacant units on the open rental market. Specifically, the complaint alleges: "Because the maximum rents established by the Rent Board for [Jones's] properties were in excess of what he could charge for these units in an unregulated market, the Rent Control Law *as applied* is demonstrably irrelevant to its stated purpose of protecting renters from unwarranted rent increases." (Italics added.)

This allegation has a fatal logical defect. Jones's inability to rent *his* property at rates the Board would permit does not demonstrate the Ordinance's failure to advance its purpose of protecting *all* Berkeley tenants from "unwarranted rent increases." There are many possible reasons for Jones's predicament, but under no circumstances does his particular situation provide a basis for proving the Ordinance does not generally serve its purposes in the city. The facts pleaded are simply insufficient to meet the threshold criteria for a takings challenge under *Agins*, *Nollan*, and *Dolan*.[8]

As a commercial property owner, Jones objects to the fee imposed on his holdings. His recourse, under the facts presented

---

[8] Because we determine that Jones has failed to allege facts sufficient to show the Ordinance fails to substantially advance the legitimate governmental interest of protecting tenants from unwarranted rent increases, we need not address the separate issue of whether or not the Ordinance advances any of its other stated purposes, such as "maintain[ing] the diversity of the Berkeley community" and "advanc[ing] the housing policies of the city with regard to low and fixed income persons, minorities, students, handicapped, and the aged."

here, is to the policymakers in his community. Generally, it is for the Legislature to weigh and resolve economic and social arguments over rent controls. In the final analysis, this is a political debate. (*Ehrlich, supra*, 12 Cal.4th at p. 881; *Westwinds, supra*, 30 Cal.App.4th at p. 95, fn. 8; *Sandpiper, supra*, 10 Cal.App.4th at p. 551 .) Although reasonable minds may differ on the wisdom or efficacy of the Ordinance, it is for the courts to adjudicate what is legal, not impose their view of what is wise.

DISPOSITION

The judgment is affirmed.

Corrigan, J.

We concur:

Phelan, P.J.

Parrilli, J.

Appendix B-1

Filed 03/09/99

First Appellate District, Division Three No. A074395

SO64321

IN THE SUPREME COURT OF CALIFORNIA

BAILEY A. JONES, Appellant

v.

CITY OF BERKELEY RENT STABILIATION BOARD,
Respondent, D. SMITH et al., Real Parties in Interest

Pursuant to rule 29.4(c), California Rules of Court, the above-entitled review is DISMISSED and cause is remanded to the Court of Appeal, First Appellate District, Division Three.

George
Chief Justice

Mosk
Associate Justice

Kennard
Associate Justice

Werdegar
Associate Justice

Chin
Associate Justice

Associate Justice

Associate Justice

Appendix C-1

Filed 11/25/97

1/3 No. A074395
SO64321
IN THE SUPREME COURT OF CALIFORNIA

BAILEY A. JONES, Appellant
v.
CITY OF BERKELEY RENT STABILIATION BOARD,
Respondent, D. SMITH et al., Real Parties in Interest

Petition for review GRANTED.

Further action in this matter is deferred pending consideration and disposition of a related issue in *Santa Monica Beach Limited v. Superior Court*, S052824 (see Cal. Rules of Court, rule 29.2(c)), or pending further order of the court. Submission of additional briefing, pursuant to California Rules of Court, rule 29.3, is deferred pending further order of the court.

George
Chief Justice

Kennard
Associate Justice

Baxter
Associate Justice

Werdegar
Associate Justice

Chin
Associate Justice

Appendix C-2

Brown

Associate Justice

Associate Justice

Appendix D-1

Filed 4/17/96

MARJORIE GELB, Chief Counsel Bar #50576
BRIAN KELLY, Staff Attorney Bar #10182
DONALD A. TINE, Staff Attorney Bar #142144
2125 Milvia Street
Berkeley, CA 94704
Telephone (510) 644-7714
Facsimile (510) 644-77023

Attorneys For Cross-Complainants and Defendant
City of Berkeley Rent Stabilization Board

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

BAILEY A. JONES, Plaintiff, vs. CITY OF BERKELEY RENT STABILIZATION BOARD, Defendant.	NO. 743567-6 **JUDGMENT**
CITY OF BERKELEY RENT STABILIZATION BOARD, Cross-complainant and Defendant, vs. Bailey A. Jones, Cross-defendant and Plaintiff.	
D. SMITH, et al., Real Parties in Interest.	

This Court, having on March 14, 1996 granted defendant City of Berkeley Rent Stabilization Board's motion for judgment on the pleadings pursuant to Code of Civil Procedures § 438 and the complaint not being open to amendment, and the cross-complaint having been voluntarily dismissed by the Board pursuant to a stipulation of the parties, now therefore

IT IS ORDERED, ADJUDICATED, AND DECREED that the complaint shall be dismissed with prejudice and that plaintiff Bailey A. Jones shall take nothing by this action.

Dated: Apr. 17 1996

/s/ RICHARD A. HODGE
JUDGE OF THE SUPERIOR COURT

Filed 3/14/96

MARJORIE GELB, Chief Counsel Bar #50576
BRIAN KELLY, Staff Attorney Bar #10182
DONALD A. TINE, Staff Attorney Bar #142144
2125 Milvia Street
Berkeley, CA 94704
Telephone (510) 644-7714
Facsimile (510) 644-77023

Attorneys For Cross-Complainants and Defendant
City of Berkeley Rent Stabilization Board

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

BAILEY A. JONES, Plaintiff, vs. CITY OF BERKELEY RENT STABILIZATION BOARD, Defendant.	NO. 743567-6 **ORDER GRANTING DEFENDANT RENT BOARD'S MOTION FOR JUDGMENT ON THE PLEADINGS** --- **Code of Civil Procedure § 438**
CITY OF BERKELEY RENT STABILIZATION BOARD, Cross-complainant and Defendant, vs. Bailey A. Jones, Cross-defendant and Plaintiff.	
D. SMITH, et al., Real Parties in Interest.	

Defendant City of Berkeley Rent Stabilization Board's Motion for Judgment on the Pleadings pursuant to Code of Civil Procedures § 438 came on regularly for hearing by the Court at 9:00 a.m. in Department 81 on March 7, 1996. The parties were represented by their respective counsel.

After consideration of the Motion and the points and authorities submitted in support of and in opposition to the Motion and having heard and considered the arguments of counsel, the court holds as follows:

IT IS THEREFORE ORDERED that the Rent Board's Motion for Judgment on the Pleadings be granted. Plaintiff fails to allege a cause of action for an unconstitutional taking because he has not alleged the predicate serious economic injury, *i.e.* that he is being denied a fair return on his property or is being prevented from realizing any viable use for the property. *See West Hollywood Concerned Citizens v. City of West Hollywood* (1991) 232 Cal.App.3d 486, 496-500. The allegation the Rent Ordinance does not substantially advance its purpose is inadequate on its own to state a cause of action for a taking. See *Del Oro Hills v. City of Oceanside* (1995) 31 Cal.App.4th 1060, 1079.

Dated: 3/17/96

/s/ RICHARD A. HODGE
JUDGE OF THE SUPERIOR COURT

IX. RENT STABILIZATION

Chapter 13.76

RENT STABILIZATION AND EVICTION FOR GOOD CAUSE PROGRAM

13.76.010 Title.

This chapter shall be known as the Rent Stabilization and Eviction for Good Cause Ordinance. (Ord. 5467-NS § 1, 1982; Ord. 5261-NS § 1, 1980.)

13.76.020 Findings.

A. The Housing Element of the Berkeley Master Plan of 1977 states that:

1. Berkeley residents have the right to decent housing in pleasant neighborhoods which meet standards of adequacy at a range of prices they can afford. (Goal 1)

2. Existing housing should be maintained and improved. (Goal 2)

3. Berkeley should have an adequate supply of housing throughout the city for persons with special needs. (Goal 3)

4. All residents should have equal access to housing opportunities, financing and insurance on a non-discriminatory basis. (Goal 4)

B. On June 6, 1972, the electorate of the city of Berkeley passed a rent control charter amendment that was later voided by the California Supreme Court as being unconstitutional.

C. On June 5, 1973, the city council declared the existence of a housing emergency in the city of Berkeley, based upon the council's finding of a pattern of steadily rising rents, a

shortage of decent housing and an increased deterioration of the existing housing stock in the city.

D. On November 7, 1978, the electorate of the city of Berkeley passed a renter property tax relief ordinance.

E. On October 25, 1979, the Berkeley City Council, Berkeley Housing Authority, the Berkeley Housing Advisory and Appeals Board, and members of the city's administrative staff held a public workshop regarding the current housing conditions in Berkeley.

F. On October 30, 1979, January 26, 1980 and February 21, 1980, the Berkeley City Council held public hearings at which members of the public expressed their views regarding current housing conditions in Berkeley and legislative proposals for rent stabilization and eviction controls.

G. The most significant provisions of the 1978 Renter Property Tax Relief Ordinance expired on December 30, 1979.

H. On November 27, 1979, the Berkeley City Council passed an ordinance establishing a temporary rent stabilization program, effective until June 30, 1980. (Ord. 5467-NS § 2, 1982: Ord. 5261-NS § 2, 1980.)

13.76.030 Purpose.

The purposes of this chapter are to regulate residential rent increases in the city of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation is designed to address the city of Berkeley's housing crisis, preserve the public peace, health and safety, and advance the housing policies of the city with regard to low and fixed income persons, minorities, students, handicapped, and the aged. (Ord. 5467-NS § 3, 1982: Ord. 5261-NS § 3, 1980.)

. . .

13.76.050 Applicability.

This chapter shall apply to all real property which is being rented or is available for rent for residential use in whole or in part, except for the following:

A. Rental units which are owned by any government agency. However, the exemption of units owned by the Berkeley Housing Authority from the terms of this chapter shall be limited to their exemption from the terms of Section 13.76.080, Rent Registration; Section 13.76.100, Establishment of Base Rent Ceiling and Posting; Section 13.76.110, Annual General Adjustment of Rent Ceilings; and Section 13.76.120, Individual Adjustments of Rent Ceilings, of this chapter.

B. Rental units which are rented primarily to transient guests for use or occupancy less than fourteen consecutive days in establishments such as hotels, motels, inns, tourist homes, and rooming and boarding houses. However, the payment of rent every fourteen days or less shall not by itself exempt any unit from coverage by this chapter.

C. Rental units in nonprofit cooperatives owned and controlled by a majority of the residents.

D. Rental units leased by the Berkeley Housing Authority under the Section 23 program (42 U.S.C., Section 1421b) or rental units leased to tenants assisted under the Section 8 program (42 U.S.C. Section 1437f). However, except as may be preempted by state or federal law, the exemption of such rental units from the terms of this chapter shall be limited to Section 13.76.080, Rent Registration; Section 13.76.100, Establishment of Base Rent Ceiling and Posting; Section 13.76.110, Annual General Adjustment of Rent Ceilings and Section 13.76.120, Individual Adjustments of Rent Ceilings, of this chapter.

E. Rental units in any hospital, skilled nursing facility, health facility, asylum, or non-profit home for the aged.

F. Rental units in a residential property which is divided into a maximum of four units where one of such units is occupied by the landlord as his/her principal residence. Any exemption of rental units established under this subsection (13.76.050 F.) shall be limited to rental units that would have been exempt under the provisions of this chapter had this chapter been in effect on December 31, 1979.

After July 1, 1982, this exemption shall no longer apply to rental units in a residential property which is divided into three or four units. It shall continue to apply to rental units in a residential property which is divided into two units, and which meet all the other requirements of this subsection (13.76.050 F). Rental units which become nonexempt under this provision shall have the provisions of subsections 13.76.080I and 13.76.100C. applied to them.

G. A rental unit in a residential property where the landlord shares kitchen or bath facilities with the tenant(s) of such rental unit and where the landlord also occupies a unit in the same property as his/her principal residence.

H. For the purposes of subsections 13.76.050 F. and G., the term landlord shall be defined only as the owner of record holding at least fifty percent interest in the property.

I. Newly constructed rental units which are completed and offered for rent for the first time after the effective date of this chapter, provided that such new units were not created as a result of rehabilitation or conversion as opposed to new construction. However, the exemption of such newly constructed units shall be limited to their exemption from the terms of Section 13.76.080, Rent Registration; Section 13.76.100, Establishment of Base Rent Ceiling and Posting; Section 13.76.110, Annual General Adjustment of Rent

Ceilings; and Section 13.76.120, Individual Adjustments of Rent Ceilings, of this chapter.

J. A rental unit which is rented by a nonprofit, accredited institution of higher education tenant or tenants who are student(s), faculty, or staff of the institution or of a member school of the Graduate Theological Union, provided, however, that the institution owned the unit as of January 1, 1988.

(Ord. 5872-NS § 2, 1988; Ord. 5467-NS § 5, 1982: Ord. 5261-NS § 5, 1980.)

13.76.060 Rent stabilization board.

A. Composition. There shall be in the city of Berkeley an elected rent stabilization board; the board shall consist of nine Commissioners. The board shall elect annually as chairperson one of its members to serve in that capacity.

. . .

F. Powers and duties. The elected rent stabilization board shall have the power to determine, to arbitrate and to set rent levels, whether through general or individual adjustments, of any unit which has controlled rents under any Berkeley Ordinance, and to administer any Berkeley program which regulates rents and evictions. The board shall have the following powers and duties:

1. Set the rent ceilings for all rental units.

2. Require registration of all rental units under Section 13.76.080.

3. Publicize the manner in which the base rent ceiling is established under Section 13.76.100.

4. To make adjustments in the rent ceiling in accordance with Sections 13.76.110 and 13.76.120.

5. Set rents at fair and equitable levels in view of and in order to achieve the purposes of this chapter.

6. To issue orders, rules and regulations, conduct hearings and charge fees as set below.

7. Make such studies, surveys and investigations, conduct such hearings, and obtain such information as is necessary to carry out its powers and duties.

8. Report annually to the city council of the city of Berkeley on the status of rental housing units covered by this chapter.

9. Request the city council to remove rent controls under Section 13.76.060Q.

10. Administer oaths and affirmations and subpoena witnesses and relevant documents.

11. Establish rules and regulations for settling civil claims under Section 13.76.150.

12. Seek injunctive relief under Section 13.76.150.

13. Pursue civil remedies in courts of appropriate jurisdiction.

14. Intervene as an interested party in any litigation brought before a court of appropriate jurisdiction by a landlord or tenant with respect to rental units covered by this chapter.

15. Hold public hearings.

16. Charge and collect registration fees, including penalties for late payments.

17. Other powers necessary to carry out the purposes of this chapter which are not inconsistent with the terms of this chapter.

18. Except as provided in section 13.76.060N of this chapter, the board shall finance its reasonable and necessary expenses for its operation without the use of general fund monies of the city of Berkeley.

. . .

N. Financing. The board shall finance its reasonable and necessary expenses by charging landlords annual registration fees in amounts deemed reasonable by the board. Such registration fees shall not be passed on to tenants in the form of rent increases except with the express prior approval of the board. The board is also empowered to request and receive funding, when and if necessary, from the city of Berkeley and/or any other available source for its reasonable and necessary expenses.

. . .

13.76.080 Rent registration.

A. The board shall require all landlords subject to the provisions of this chapter to file with the board by September 1, 1980 a rent registration statement for each rental unit covered by this chapter. . . .

. . .

D. The first annual registration fee of twelve dollars per unit shall be paid by the landlords to the board no later than September 1, 1980. Subsequent annual registration fees set in accordance with Section 13.76.060N of this chapter shall be paid no later than July 1 of each year. Because fees charged in years prior to 1991 were due On September 1 but paid for board expenses from each preceding July 1, the fee due in 1991 shall be calculated to pay for twelve months of board expenses.

. . .

F. Every annual registration fee required by this chapter which is not paid on or before July 1 is declared delinquent, and the board shall add to said registration fee and collect a penalty of one hundred percent of the fee so delinquent in addition to the fee. Every six months that the fee and penalty remain delinquent, the penalty shall be increased by one hundred percent of the original fee. . . .

. . .

K. Registration fees shall not be passed along to the tenants without the express, prior approval of the board. Under no circumstances shall penalties be passed along to tenants.

. . .

13.76.100 Establishment of base rent ceiling and posting.

A. Base Rent Ceiling. Upon adoption of this chapter, no landlord shall charge rent for any rental unit covered by the terms of this chapter affecting rents in an amount greater than the lawful rent which was actually due and payable on, or last preceding May 31, 1980, under the periodic term of the rental agreement, in accordance with the provisions of the Temporary Rent Stabilization Ordinance, No. 5212-N.S., except as permitted by the board under Sections 13.76.110 and 13.76.120 of this chapter. . . .

. . .

13.76.190 Criminal penalties.

Any landlord who is found by a court of competent jurisdiction to be guilty of a willful violation of this chapter shall be subject to up to a five hundred dollar fine and/or ninety days in jail for a first offense and up to a three thousand dollar fine and/or one year in jail for any subsequent offenses. (Ord. 5467-NS § 19, 1982.)